# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Gemini International, Inc.	)	
and Sprint Nextel	) WT I	Oocket No. 02-55
	)	
Mediation No. TAM-31019	ĺ	

### MEMORANDUM OPINION AND ORDER

Adopted: April 3, 2007 Released: April 3, 2007

By the Associate Chief, Public Safety and Homeland Security Bureau:

### I. INTRODUCTION

- 1. In this Order, we address a case referred to us for *de novo* review from Wave 3, Stage 1 mediation by the 800 MHz Transition Administrator (TA) involving disputed issues between Gemini International, Inc. (Gemini) and Sprint Nextel Corporation (Sprint). The first dispute concerns whether Gemini is eligible to relocate its site-based 800 MHz system in Puerto Rico, licensed under call sign WPEX853, to the Enhanced Specialized Mobile Radio (ESMR) band. The second issue is whether Gemini fulfilled its obligation to negotiate and mediate in good faith.
- 2. Based on our *de novo* review of the mediation record, we find that Gemini is not eligible to relocate to the ESMR band. We also find that Gemini violated the good faith requirements of Section 90.677(c) of the Commission's rules<sup>1</sup> by, among other things, failing to provide sufficient information about its station to allow meaningful negotiation and mediation of its retuning costs and other details of retuning the station. We therefore hold that Gemini, rather than Sprint, is responsible for the cost of retuning its station.

### II. BACKGROUND

3. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a Frequency Relocation Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.<sup>2</sup> The FRA must provide for relocation of the licensee's system to its new channel assignment at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required.<sup>3</sup> Sprint must provide

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<sup>&</sup>lt;sup>1</sup> 47 C.F.R. § 90.677.

<sup>&</sup>lt;sup>2</sup> See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) as amended by Erratum, 19 FCC Rcd 19651 (2004), and Erratum, 19 FCC Rcd 21818 (2004) (800 MHz R&O) Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order), and Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015, as amended by Erratum, DA 05-3061 rel. Nov. 25, 2005 (800 MHz MO&O).

<sup>&</sup>lt;sup>3</sup> The channel change(s) are commonly referred to as a "retuning" of the system. In some instances, however, a channel change requires that equipment must be replaced rather than retuned. For convenience, unless the context requires otherwise, "retuning" as used herein also encompasses equipment replacement if existing equipment cannot be retuned.

the relocating licensee with "comparable facilities" on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the relocation process. <sup>4</sup> The Commission established by rule and emphasized in its orders an obligation for parties to engage in good faith negotiation throughout the process to ensure rapid achievement of the Commission's goal of eliminating unacceptable interference to public safety communications by timely reconfiguring the 800 MHz band.<sup>5</sup>

- 4. Under the 800 MHz R&O and subsequent orders, 800 MHz licensees are entitled to relocate to the ESMR band only if they are currently operating ESMR systems or if they hold Economic Area (EA) geographic licenses and elect to convert to ESMR operations. In addition, under certain conditions, EA licensees that also hold site-based licenses may move both their geographic and site-based channels into comparable spectrum in the ESMR band. However, 800 MHz licensees whose licenses are exclusively site-based and who do not operate ESMR systems are not eligible to move to the ESMR band.
- 5. In the present case, Gemini holds a site-based license for a single fixed site and seventy mobile units in Puerto Rico, and operates a conventional non-ESMR system.<sup>6</sup> During negotiations with Sprint, however, Gemini claimed to be eligible to relocate to the ESMR band based on an alleged agreement with Preferred Communications Systems, Inc. (Preferred), an EA licensee in Puerto Rico that had elected to relocate to the ESMR band and convert to ESMR operations. Sprint disputed Gemini's claim to eligibility and questioned the underlying agreement between Gemini and Preferred. Sprint also contended that during negotiations, Gemini failed to provide required information about its system to Sprint from which a relocation cost estimate could be derived. At the conclusion of the mandatory negotiation period, these disputes were referred to mediation. When the parties failed to reach agreement in mediation, the mediator forwarded the mediation record to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.<sup>7</sup>

### A. ESMR Band Eligibility—Parties' Positions and Mediator Recommendations

6. Gemini Position. Gemini contends that it is eligible to relocate its site-based facility to the ESMR band based on its relationship with Preferred, which has elected to relocate its EA licenses in Puerto Rico to the ESMR band. Gemini notes that in the 800 MHz MO&O, the Commission allowed relocating EA licensees such as Preferred to relocate associated site-based facilities to the ESMR band, provided that such facilities were an integral part of their systems as of November 22, 2004. Gemini contends that its site-based facility should be treated as part of Preferred's system for rebanding purposes. In support of this contention, Gemini states that it entered into a License Purchase Agreement with Preferred in 1998 whereby Preferred was to acquire Gemini's station. Gemini also notes that its station is co-located with numerous

<sup>&</sup>lt;sup>4</sup> Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. 800 MHz R&O, 19 FCC Rcd at 15077 ¶ 201.

<sup>&</sup>lt;sup>5</sup> See 47 C.F.R. § 90.677(c). See also 800 MHz R&O, 19 FCC Rcd 15076-77 ¶ 201. See also e.g. Reminder to 800 MHz Wave Three Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations, *Public Notice*, WT Docket No. 02-55, 21 FCC Rcd 7122 (WTB 2006). (Failure to negotiate in good faith is subject to Commission sanctions, including involuntary relocation and license modification to the extent necessary to implement band reconfiguration and that the cost of implementing such modification must be borne by the licensee.)

<sup>&</sup>lt;sup>6</sup> See http://wireless2.fcc.gov/UlsApp/UlsSearch/licenseFreqSum.jsp?licKey=1141009.

<sup>&</sup>lt;sup>7</sup> The voluntary mediation period began on January 3, 2006. Pursuant to a request by Sprint, the TA began the mediation on June 8, 2006, ahead of schedule. Recommended Resolution (RR) at 2. This mediation period ended on August 14, 2006. *Id*.

<sup>&</sup>lt;sup>8</sup> Proposed Resolution Memorandum of Gemini International, Inc., filed July 25, 2006 (Gemini PRM) at 2.

<sup>&</sup>lt;sup>9</sup> See 800 MHz MO&O, 20 FCC Rcd 16015, 16026-27 ¶ 25.

Preferred stations, and that the station was listed in Preferred's February 1, 2006 election to relocate to the ESMR band. Gemini also submits that further consideration of Gemini's case should be stayed pending resolution of Preferred's request for waiver of the Commission's construction deadlines for Preferred's EA licenses.<sup>10</sup>

- 7. Sprint Position. Sprint contends that Gemini has failed to demonstrate that its station has ever been an integral part of any system operated by Preferred. Sprint argues that the only record evidence of any relationship between Gemini and Preferred is the 1998 License Purchase Agreement, which was never consummated, and that Gemini has not supplied documents, such as a management agreement or spectrum leasing agreement, that would establish that Preferred has the degree of control over Gemini's station claimed by Gemini. Sprint also claims that Gemini has taken inconsistent positions during the negotiation and mediation process, initially claiming that it did not need to negotiate with Sprint because Preferred was authorized to negotiate on its behalf, but later negotiating for itself. Finally, Sprint notes that, pursuant to guidance from the Commission, the TA determined that a stay of the Gemini mediation was not warranted because relocation of Gemini's station was a matter separate from Preferred's construction waiver request.
- 8. *Mediator Recommendation*. The mediator recommended finding that Gemini is not eligible to relocate to the ESMR Band. The mediator rejected the claim that Gemini's facility could be included in Preferred's election because Gemini had offered no evidence of any "operational relationship" with Preferred as of November 22, 2004, whether by spectrum lease, management agreement, or otherwise. <sup>14</sup> The mediator concluded that the unconsummated License Purchase Agreement between Gemini and Preferred did not establish that Preferred had an ownership interest in Gemini's station.

## B. Good Faith Negotiations—Parties' Position Statements and Mediator Recommendation

- 9. Gemini Position. Gemini contends that it has negotiated in good faith. 15
- 10. *Sprint Position.* Sprint contends that Gemini failed to negotiate in good faith and as a result, should bear the entire cost of the mediation and the reconfiguration of its station. Specifically, Sprint alleges that:
  - Gemini refused to engage in negotiations during the negotiation period because of its insistence that Sprint should negotiate with Preferred instead; 16
  - Gemini failed to develop a cost estimate for the relocation of its station;<sup>17</sup>
  - Gemini failed to provide Sprint with information necessary for it to make a meaningful offer,

<sup>&</sup>lt;sup>10</sup> RR at 6. On December 14, 2005, Preferred filed construction deadline waiver requests for its thirty-eight Economic Area (EA) licenses. FCC File No. 0002408877 *et al.* and Exhibit 1 "Justification for Grant of Requested Waiver" (Dec. 14, 2005) (Waiver Request). *See also* Letter from Paul C. Besozzi, Esq., Counsel for Preferred Acquisitions, Inc. to Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Dec. 19, 2005). These requests remain pending.

<sup>&</sup>lt;sup>11</sup> *Id.* at 12.

<sup>&</sup>lt;sup>12</sup> See Sprint PRM at 9.

<sup>&</sup>lt;sup>13</sup> *Id.* at 9-10.

 $<sup>^{14}</sup>$  RR at 6-7 citing 800 MHz Supplemental Order, 19 FCC Rcd at 25154-55  $\P$  78 and 800 MHz MO&O, 20 FCC Rcd 16025  $\P$  20.

<sup>&</sup>lt;sup>15</sup> Gemini PRM at 5.

<sup>&</sup>lt;sup>16</sup> Sprint PRM at 2.

<sup>&</sup>lt;sup>17</sup> *Id.* at 2-3, 13.

as directed by the mediator;<sup>18</sup>

- Contrary to the mediator's direction, Gemini failed to provide any reasons for its rejection of a \$4,850 settlement offer made by Sprint<sup>19</sup>
- Gemini failed to provide any counter-offer to Sprint's offer;<sup>20</sup> and
- Gemini's PRM contains frivolous arguments and Gemini improperly attached a draft planning funding request to the PRM.<sup>21</sup>

11. *Mediator Recommendation*. The mediator recommended finding that Gemini failed to negotiate in good faith. The mediator concluded that Gemini failed to: (a) provide Sprint with any estimate of its relocation costs; (b) provide the technical information requested by Sprint in order to formulate a good faith offer, as directed by the mediator; (c) provide any reasons for rejecting Sprint's offer, as directed by the mediator; and (d) make any counter-offer to Sprint's offer.<sup>22</sup> Moreover, the mediator states that he advised Gemini on several occasions of its duty to negotiate in good faith, and of the consequences of its failure to do so.<sup>23</sup> However, the mediator recommended finding that Gemini's conduct was mitigated because Gemini's principal, Sheldon Weaver, cooperated with the mediator in the scheduling of conference calls and timely participated in those telephone conferences. The mediator recommended that Sprint pay \$4,850—the amount of its settlement offer—towards Gemini's relocation expenses, but that any relocation expenses in excess of that amount should be borne by Gemini.<sup>24</sup>

### III. DISCUSSION

### A. ESMR Band Eligibility

12. We find that Gemini has failed to establish eligibility to relocate to the ESMR band. The record does not support Gemini's contention that its site-based facility should be treated as part of Preferred's system for rebanding purposes. In the 800 MHz MO&O, the Commission allowed relocating EA licensees to relocate "site-based stations that were part of the licensee's integrated communications system" as of November 22, 2004, and are located within or near the geographic boundaries of the relevant EA.<sup>25</sup> Gemini has failed to show that its facility has ever been an integrated part of any system operated by Preferred, either on November 22, 2004 or since. The only evidence offered by Gemini in support of its claim is its 1998 License Purchase Agreement with Preferred.<sup>26</sup> However, there is no evidence that this agreement ever resulted in the assignment of Gemini's license to Preferred, nor did the parties ever file an application for assignment of the license with the Commission.<sup>27</sup>

13. Even if Gemini had assigned its license to Preferred, this would not be sufficient to demonstrate

<sup>&</sup>lt;sup>18</sup> *Id.* at 3-4.

<sup>&</sup>lt;sup>19</sup> *Id.* at 3, 8.

<sup>&</sup>lt;sup>20</sup> *Id.* at 3.

<sup>&</sup>lt;sup>21</sup> *Id.* at 3-4, 7.

<sup>&</sup>lt;sup>22</sup> RR at 8 (internal citations omitted).

<sup>&</sup>lt;sup>23</sup> *Id.* The mediator notes that in its PRM, Gemini belatedly provides certain technical information regarding its system, but it fails to address all of the questions posed by Sprint. The Gemini PRM also belatedly addresses only one cost item in Sprint's *bona fide* offer—base stations/repeaters—which it claims would cost at least \$27,000 to replace, but does not attempt to substantiate either this figure or the necessity of replacing the units. *Id.* 

<sup>&</sup>lt;sup>24</sup> *Id.* at 9.

<sup>&</sup>lt;sup>25</sup> See 800 MHz MO&O, 20 FCC Rcd 16015, 16026-27 ¶.

<sup>&</sup>lt;sup>26</sup> Appendix 2 of Gemini PRM.

<sup>&</sup>lt;sup>27</sup> RR at 7.

that Gemini's station was "an integral part of [Preferred's] communications system" as of November 22, 2004.<sup>28</sup> Although Gemini claims that its facility is located at a site where Preferred operates other stations, this is not sufficient to show that Gemini's facilities are part of Preferred's system. Indeed, there is nothing in the record establishing the nature of Preferred's communications system, much less that Gemini's station is an integrated part of that system. Although Gemini represented during mediation that Preferred "currently manages Gemini's license" it has provided no documentation of that claim, or that this relationship existed as of November 22, 2004. Hence, we find that the record fails to show that Preferred exercises either ownership or control of Gemini's station.

14. Accordingly, we find that Gemini has not satisfied the threshold requirements for relocating site based stations to the ESMR band. Moreover, there is no relationship between Gemini and Preferred sufficient to establish that resolution of this case should be stayed pending Preferred's request for waiver of its EA license construction deadlines. Therefore, we decline to stay these proceedings, resolve the ESMR relocation issue in Sprint's favor, and direct Gemini to relocate its station to the frequency specified by the TA without delay.

#### В. **Good Faith Negotiations**

15. The Commission has emphasized in this proceeding that good faith negotiation by all parties is essential to achieving the Commission's rebanding objectives.<sup>30</sup> We find that Gemini has breached its good faith obligation. Among the indicia of good faith negotiation are (a) the steps a party has taken to determine the actual cost of relocation to comparable facilities; (b) whether a party has unreasonably withheld from the other party information, essential to the accurate estimation of relocation costs and procedures, requested by the other party and (c) whether a party has made a counteroffer when presented an offer by the other party. The record discloses that Gemini did not determine the actual cost of relocating its station, did not provide Sprint with the information necessary to conclude an FRA with Gemini, and did not respond to Sprint's bona fide offer by making a counter-offer. 31

16. We find that Gemini's refusal to heed the Commission's rules and follow the mediator's direction to conform to those rules exhibits a lack of good faith. We also do not find Gemini's lack of good faith to be mitigated by Mr. Weaver's conduct. Even assuming that Mr. Weaver willingly participated in conference calls set up by the mediator, the record shows that he was unprepared to provide the information necessary to engage in meaningful mediation. The mediator observed that Mr. Weaver's participation in these calls was not meaningful because he did not provide technical and other details of Gemini's system of which he professed ignorance.<sup>32</sup> In short, the Commission's good faith requirements are not satisfied by

<sup>&</sup>lt;sup>28</sup> The reason the Commission established a cutoff date limiting the relocation of site-based licenses into the ESMR Band was to discourage licensees from seeking to acquire and relocate large numbers of site-based licenses to the ESMR Band for speculative purposes. See 800 MHz MO&O, 20 FCC Rcd at 16025 ¶ 20. The Commission's decisions in the 800 MHz Supplemental Order and the 800 MHz MO&O only allowed EA licenses to relocate to the ESMR band their site-based licenses that were an integral part of their communications system as of November 22, 2004. See 800 MHz Supplemental Order, 19 FCC Rcd at 25154-55 ¶ 78 and 800 MHz MO&O, 20 FCC Rcd at 16026-27 ¶ 25.

<sup>&</sup>lt;sup>29</sup> *Id* at 3, n.8.

<sup>&</sup>lt;sup>30</sup> See 47 C.F.R. § 90.677(c). See also 800 MHz R&O, 19 FCC Rcd 15076-77 ¶ 201. See also e.g. Reminder to 800 MHz Wave Three Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations, Public Notice, WT Docket No. 02-55, 21 FCC Rcd 7122 (WTB 2006). (Failure to negotiate in good faith is subject to Commission sanctions, including involuntary relocation and license modification to the extent necessary to implement band reconfiguration and that the cost of implementing such modification must be borne by the licensee.)

<sup>&</sup>lt;sup>31</sup> We agree with the mediator that Gemini's eleventh-hour submission of a draft Request for Planning Funding in connection with its PRM was impermissibly untimely and irrelevant to the issues under mediation.

<sup>&</sup>lt;sup>32</sup> RR at 8-9. During mediation, Mr. Weaver said that he relied on "Preferred's cooperation" to provide information about the system, and that such cooperation was "not always forthcoming." Id. This is not sufficient to meet the

mere attendance at mediation conferences, but require licensees to participate substantively and provide information necessary to the resolution of issues. We likewise decline to follow the mediator's recommendation that Sprint pay \$4,850 towards Gemini's relocation costs.<sup>33</sup> There is insufficient record support for requiring Sprint to pay any amount to Gemini. Moreover, because of its failure to negotiate and mediate in good faith, Gemini has forfeited any right to payment for reconfiguration and must bear its own relocation costs or surrender its license.

### IV. ORDERING CLAUSE

17. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission's Rules, 47 C.F.R. § 90.677, IT IS ORDERED that the disputes submitted for *de novo* review by the Transition Administrator are resolved in Sprint's favor in the manner discussed above.

FEDERAL COMMUNICATIONS COMMISSION

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good faith standard, and raises serious questions about whether Gemini is exercising the degree of control required of a Commission licensee.

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<sup>&</sup>lt;sup>33</sup> RR at 8-9.